

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE MACERICH PARTNERSHIP, LP, et al.,

Plaintiff(s),

v.

McCARTHY BUILDING COMPANIES, et al.,

Defendant(s)/Third-Party
Plaintiffs,

v.

CADMAN, INC., et al.,

Third-Party Defendant(s).

NO. C03-2656P

ORDER ON THIRD-PARTY
DEFENDANT CADMAN, INC.'S
MOTION TO STRIKE PLAINTIFFS'
AND DEFENDANT/THIRD-PARTY
PLAINTIFFS' DISCLOSURE OF
EXPERT WITNESSES

The above-entitled Court, having received and reviewed:

1. Third-Party Defendant Cadman Inc.'s Motion to Strike Plaintiffs' and Defendants/Third-Party Plaintiffs' Disclosure of Expert Witnesses
2. McCarthy Building Companies, Inc.'s and SDL Corporation's Response in Opposition to Third-Party Defendant Cadman Inc.'s Motion to Strike Plaintiffs' and Defendants/Third-Party Plaintiffs' Disclosure of Expert Witnesses
3. Plaintiff's Opposition to Cadman's Motion to Strike Plaintiff's and Defendant's/Third-Party Plaintiff's Disclosure of Expert Witnesses
4. Third-Party Defendant Cadman Inc.'s Reply in Support of Motion to Strike Plaintiffs' and Defendants/Third-Party Plaintiffs' Disclosure of Expert Witnesses

and all exhibits and declarations attached thereto, makes the following ruling:

**ORD ON MTN TO STRIKE
EXPERT WITNESSES - 1**

IT IS HEREBY ORDERED that the motion is PARTIALLY GRANTED and PARTIALLY DENIED. The following experts will be permitted to testify: Bob Englekirk for Plaintiff Macerich Partnership and Dick Glasheen and Marshall Pihl for Defendant/Third-Party Plaintiff McCarthy Building Companies, Inc. All remaining designated experts for the two parties will not be permitted to offer expert testimony in the above-entitled matter.

Background

The case schedule in this matter set a deadline of April 20, 2005 for the disclosure of expert witnesses. On April 28, 2005, Plaintiff Macerich Partnership (“Macerich”) served Third-Party Defendant Cadman, Inc. (“Cadman”) with its disclosure of purported experts. On May 3, 2005, Defendant/Third-Party Plaintiff McCarthy Building Companies, Inc. (“McCarthy”) filed its expert disclosure.

The Court has reviewed the documents submitted by Macerich and McCarthy in conjunction with their expert witness disclosures and includes herein a summary of those materials, broken down by witness:

1. Dick Glasheen (McCarthy): a *curriculum vitae* (“CV”) and a report dated February 18, 2005 which details his investigation and conclusions. Decl. of Umberger, Exh’s 1 and 6..
2. Marshall Pihl (McCarthy): a CV and a February 24, 2005 report which indicates his opinions and the data upon which those opinions are based.¹ Id.
3. Mark Lawless (McCarthy): a CV and an indication of what he “may” testify to. Id.
4. Saad Moustafa (Macerich): a CV and an indication of what his compensation is. Dec. of Umberger, Exh’s 2 and 3.

¹McCarthy filed a “supplemental disclosure” of experts on May 27, 2005 which references the Glahseen and Pihl reports, but still discloses nothing more than what its experts “may” testify to.

5. Bob Engelkirk (Macerich): a CV, an indication of what his compensation is and a February 15, 1999 report which contains his analysis and recommendations for solutions. Id.
6. Nick Fett (Macerich): Plaintiff has included neither a CV, nor an indication of what this expert's opinions are or the data upon which they are based. Decl. of Umberger, Exh. 2.
7. David Eisenham (Macerich): a December 3, 1997 report which includes his opinions and recommendations; there is no CV indicating his background or qualifications. Id.
8. William Cichanski (Macerich): a June 8, 1998 report which indicates his analysis and findings; there is no CV indicating his background or qualifications. Id.
9. Arturo Nisperos (Macerich): a June 8, 1998 report (the same as Mr. Cichanski's) which indicates his analysis and findings; there is no CV indicating his background or qualifications. Id.
10. Joseph DuPont (Macerich): a CV and a report which appears to be a bid for the waterproofing remediation project necessitated by the damage which is at issue in this lawsuit; the report contains neither his opinions nor the data upon which any opinions might be based. Decl. of Umberger, Exh's 2 and 3.

Discussion

The disclosure of expert witnesses "shall be made at the times and in the sequence directed by the court." FRCP 26(a)(2)(C). "[A] party shall disclose to other parties" the required information relating to their expert witnesses. FRCP 26(a)(2)(A). The sanction for failure to disclose is spelled out in FRCP 37(c)(1):

A party that without substantial justification fails to disclose information required by Rule 26 (a) or 26 (e)(1)... is not, unless such failure is harmless, permitted to use at trial, at a hearing, or on a motion any witness or information not so disclosed.

1 The issue of the untimely disclosure of experts by Macerich and McCarthy is two-fold: (1) was
2 the delay harmless and/or justified and (2) do the disclosures which were ultimately made satisfy the
3 requirements of the federal rules?

4 Answering the first question, the Court finds that, while neither party offered an explanation to
5 justify the delay in filing their disclosures, the delays were not of such length as to work a substantial
6 hardship or prejudice on Cadman. Although the Court has no wish to encourage a flaunting of the
7 case schedule, delays of one and two weeks are not of sufficient duration to warrant the imposition of
8 sanctions.

9 Macerich and McCarthy do not fare as well on the issue of whether their submissions met the
10 criterion of the applicable procedural guidelines for pretrial discovery. FRCP 26(a)(2)(B) sets forth
11 the requirements for an expert's report:

12 . . . The report shall contain a complete statement of all opinions to be expressed and
13 the basis and reasons therefore, the data or other information considered by the witness
14 in forming the opinions; any exhibits to be used as a summary of or support for the opinions;
15 the qualifications of the witness, including a list of all publications authored by the
16 witness within the preceding ten years; the compensation to be paid for the study and
17 testimony; and a listing of any other cases in which the witness has testified as an expert at
18 trial or by deposition within the preceding four years.

19 The responding parties make much of the fact that the Western District of Washington has
20 "opted out" of the requirement for furnishing written reports. Macerich Response, p. 3; McCarthy
21 Response, p. 3. But this avails the parties little; litigants in this district are still "required to furnish
22 other parties a statement which contains essentially the same information as would have been
23 contained in the expert's report." The only specific information which is not mandatory by our local
24 rules is a listing of the cases in which the expert has testified over the last four years. Comment, W.D.
25 WA Local Rule 26(a), at 406-07.

26 It is the finding of this Court that the material furnished by Macerich and McCarthy in
conjunction with the experts who are being stricken by this order does not contain "essentially the

1 same information as would have been contained in the expert's report" contemplated by FRCP
2 26(a)(2)(B). The rule is not satisfied by a declaration of a general area or areas that an expert "may"
3 testify to – the requirement that the proponent of the expert testimony provide "the basis and reasons
4 therefore [and} the data or other information considered by the witness in forming the opinions"
5 demands that those opinions be specifically described. Similarly, the failure to provide a CV or any
6 other statement describing the qualifications of the expert to testify in his or her area of purported
7 expertise is violative of the rule and unacceptable. The supporting material for the experts stricken by
8 this order is deficient in one or more of these areas.

9 **Conclusion**

10 The Macerich and McCarthy parties have submitted disclosures of expert witnesses which fail
11 to identify with sufficient specificity the opinions those experts will express, the reasons or basis for
12 those opinions and the qualifications of the proposed experts. The Court finds these disclosures
13 violate both FRCP 26 and Local Rule 26 and will accordingly not permit the evidence offered by any
14 of the responding parties' experts except Glasheen, Pihl and Engelkirk to be introduced.

15 The clerk is ordered to provide copies of this order to all counsel.

16 Filed this __2nd day of August, 2005.

17 

18 Marsha J. Pechman
19 U.S. District Judge

